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Roger D. Blair

Jeffrey Finci

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THE INDIVIDUAL COERCION DOCTRINE AND TYING ARRANGEMENTS: AN ECONOMIC ANALYSIS

ROGER D. BLAIR* AND JEFFREY FINCI**

I. INTRODUCTION

A tying arrangement exists when a seller requires his customers to buy one good (the tied good) as a condition of buying a second good (the tying good). For example, the owner of a cemetery may sell grave sites only upon the condition that the customer also buy a vault. In this case, the grave site is the tying good while the vault is the tied good.¹ The social desirability of tie-in sales apparently lies in the eye of the beholder. On the one hand, the Supreme Court has adopted an extremely hostile attitude toward tie-in sales. Given certain minimal conditions, tying arrangements are illegal per se.² This attitude stems from the simple belief that a seller can use economic power in the tying good market to restrain trade in the tied good market.³ On the other hand, most economists have opposed a per se treatment of tie-in sales because such a standard fails to account for the improvements in efficiency and the attendant social welfare gains that a tying arrangement may create.⁴

Tying arrangements have been popular with franchisors for a va-

* Professor of Economics, University of Florida. B.A. 1964, M.A. 1966, and Ph.D. 1968 Michigan State University. The financial support of the Public Policy Research Center at the University of Florida is gratefully acknowledged.

** Mr. Finci is currently employed as a research associate at O'Melveny & Myers, Washington, D.C. He received his B.A. in 1981 from the University of California at Berkeley.

1. There have been many instances of tying arrangements in our business history. Salt has been tied to salt dispensers, *International Salt Co. v. United States*, 332 U.S. 392 (1947); shipping services to land, *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958); punch cards to card processors, *IBM v. United States*, 298 U.S. 131 (1936); and prefabricated housing to credit, *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969). Other examples abound.

2. Per se illegality usually means that the plaintiff need only prove the existence of the proscribed business practice to prevail in court. For tying arrangements, however, the courts have adopted a qualified per se approach since there are other elements besides the tie-in arrangement which must be established. See *infra* note 20 and accompanying text. The judicial attitude toward tying arrangements will be developed in more detail. See *infra* notes 44-72 and accompanying text.

3. This view is the so-called "leverage theory" of tying arrangements in which monopoly power in the tying good market is levered into a second market, the tied good market. This theory will be examined in more detail. See *infra* notes 73-76 and accompanying text.

4. Comment, *A New Approach to the Legality of Franchising Tie-Ins*, 129 U. Pa. L. Rev. 1267, 1267 n.1 (1981). See also Note, *An Economic and Legal Analysis of Physical Tie-Ins*, 89 YALE L.J. 769 (1980) which advocates a rule of reason analysis under section 2 of the Sherman Act.

riety of reasons: as a means of extracting revenue from their franchisees, as a means of ensuring quality control and as a means of preventing improper substitution.⁵ With the increasing popularity of franchising in the past twenty years,⁶ a large number of civil antitrust cases have resulted.⁷ Consequently, the lower courts are presented with an increasing number of tying cases. In many instances, these are class action suits which expose the franchisor to potentially enormous treble damage awards.⁸ These lower courts are confronted by a dilemma. While the law is very clear that tying arrangements are illegal, this illegality appears unfounded due to the positive economic reasons for employing tying arrangements. As a consequence some lower courts have introduced a new element of proof in a tying violation: the individual coercion doctrine. Absent an express contractual agreement which sets forth the tie, some lower courts require a plaintiff to prove that he was coerced by the seller to purchase the tied good. This, of course, is a substantial hurdle for private plaintiffs and can prevent class certification.⁹ The individual coercion doctrine provides a way out of the dilemma for those lower courts which disagree with a harsh approach toward tying.

Economists never have dealt explicitly with the coercion issue as it relates to tying arrangements.¹⁰ This article will provide an eco-

5. See generally Comment, *supra* note 4, for an excellent analysis of the costs and benefits associated with tying agreements in a franchising context. The commentator argues that weighing these costs and benefits is not beyond judicial competence. *Id.* at 1268. See also Blair & Kaserman, *Vertical Control with Variable Proportions: Ownership Integration and Contractual Equivalents*, 46 S. Econ. J. 1118 (1980).

6. By 1981, franchising accounted for some 32% of all retail sales. BUREAU OF INDUSTRIAL ECONOMICS, U.S. DEPT. OF COMMERCE, *FRANCHISING IN THE ECONOMY 1979-1981* (1981).

7. Civil antitrust cases requesting damages under section 4 of the Clayton Act, 15 U.S.C. § 15 (1980), have plagued nearly every franchise relationship. See, e.g., *McDonald's, Principe v. McDonald's Corp.*, 631 F.2d 303 (4th Cir. 1980), *cert. denied*, 451 U.S. 970 (1982); *Carvel, Susser v. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), *cert. dismissed*, 381 U.S. 125 (1965); *Kentucky Fried Chicken, Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368 (5th Cir. 1977); and *Midas Mufflers, Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

8. Section 4 of the Clayton Act, 15 U.S.C. § 15 (1980), provides treble damages for successful plaintiffs: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained. . . ."

9. Class certification under Rule 23(b)(3) of the Federal Rules of Civil Procedure requires that common questions of fact or law predominate over individual questions. If each member of a putative class must establish individually that he was coerced, class certification is not appropriate. See *infra* notes 135-50 and accompanying text.

10. See Austin, *The Individual Coercion Doctrine in Tie-In Analysis: Confusing and Irrelevant*, 65 CALIF. L. REV. 1143 (1977) for an analysis of the coercion doctrine from solely

conomic interpretation of the individual coercion doctrine. First, it develops the Supreme Court's attitude toward tying arrangements. Second, it reviews the economic analysis of tying and uses this analysis to critique the Supreme Court's per se treatment. In addition, it provides an alternative approach for legally analyzing franchise tie-ins. Third, it analyzes recent lower court decisions dealing with the individual coercion doctrine. The consequences of this doctrine for private enforcement of the antitrust laws will be examined along with the implications for franchising. In particular, the authors will advance the argument that those courts favoring implementation of the individual coercion doctrine protect the franchisor and the franchising system from undeserving private plaintiffs.

II. THE SUPREME COURT ANALYSIS

Prior to the passage of the Clayton Act in 1914, tying cases had to be brought under section 1 of the Sherman Act¹¹ which prohibits restraints of trade. Those efforts, however, proved to be largely unsuccessful. For example, the A.B. Dick Company had a patent on a duplicating machine. The users of the duplicator were required to use A.B. Dick ink, paper, and stencils. When another firm manufactured and sold a substitute ink to be used in the A.B. Dick duplicator, the firm was sued for contributory infringement of the duplicator patent. In response, the defendant, ink manufacturer, argued that the Sherman Act had been violated by A.B. Dick's tying arrangement and this fact should have voided the agreement to use A.B. Dick's supplies. This defense failed.¹² Thus, tying arrangements that involved patents were not considered to be in violation of the Sherman Act.¹³ Partly in response to this decision, Congress included a prohibition against tying in section 3 of the Clayton Act¹⁴ which provided the statutory foundation for

a legal perspective.

11. Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976) provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

12. *Henry v. A.B. Dick Co.*, 224 U.S. 1, 6 (1912), *overruled*, *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 518 (1917). *See also* *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 F. 288 (6th Cir. 1896).

13. *Henry*, 224 U.S. at 29-32.

14. Section 3 of the Clayton Act, 15 U.S.C. § 14 (1976) provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented,

an increasingly hostile judicial attitude toward tying arrangements.¹⁵ In fact, with the first post-Clayton Act tying case,¹⁶ the earlier benign attitude was immediately reversed.

The Supreme Court has defined a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier."¹⁷ The judiciary's instinct¹⁸ has been that tying is used to lever market power from the tying good market into the tied good market. One of the best known and oft-repeated judicial assessments of tying arrangements is contained in Justice Frankfurter's opinion in an exclusive dealing case: "Tying agreements serve hardly any purpose beyond the suppression of competition."¹⁹ Consequently, tying arrangements have been accorded the unfortunate status of per se illegality²⁰ under the antitrust laws.²¹

for use, consumption, or resale . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the . . . commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15. "[T]ying agreements fare harshly under the laws forbidding restraints of trade." *Northern Pac. Ry.*, 356 U.S. at 6 (citing *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 606 (1953)).

16. *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917). The plaintiff held a patent on an essential mechanism in a film projector. The plaintiff attempted to restrict the use of the projectors to showing only films made under other patents that the plaintiff held. The Supreme Court refused to uphold this arrangement stating that the patentee could not impose any condition it chose on the machine's use as this would extend the patent monopoly beyond its proper scope. *Id.* at 516.

17. *Northern Pac. Ry.*, 356 U.S. at 5-6 (footnote omitted).

18. The word *instinct* is Sullivan's but it is almost a perfect choice since we have seen that precious little economic analysis supports the hostility accorded this business practice. See L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* § 150, at 431 (1977).

19. *Standard Oil Co. v. United States*, 337 U.S. 293, 305-06 (1949).

20. Tying arrangements actually receive a qualified per se status since proof of the tie alone is not sufficient. In addition, the plaintiff must prove either sufficient economic power in the tying product or that a not insubstantial amount of commerce is involved, or both. See *infra* notes 24-26 and accompanying text. Tying violations are also qualified per se because the defendant does have defenses. See *infra* note 71.

21. The advisability of per se treatment for tying has recently been questioned by several astute commentators. Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 COLUM. L. REV. 979, 1019 (1977) (footnote omitted), for example, remarked that "[t]here are second thoughts today on whether, as a matter of policy, we may not have gone too far in condemning tie-ins. Combination sales . . . may be an effective way of waging competition without any serious anticompetitive effects." R. BORK, *THE ANTITRUST PARADOX* 365 (1978), had a more forceful assessment:

Currently, tying arrangements are considered to be antitrust violations under section 3 of the Clayton Act,²² which prohibits conditional sales, and section 1 of the Sherman Act,²³ which prohibits restraints of trade. The Supreme Court established somewhat different standards of proof for a per se violation under each Act in its *Times-Picayune* decision.²⁴ Generally, if (1) a seller conditions the sale of one good on the purchase of a separate tied good, (2) the supplier has sufficient market power in the tying good to restrain competition in the tied good, and (3) a not insubstantial volume of commerce is affected, then the seller is guilty of an illegal tie under the Sherman Act. If in addition to the first requirement either of the next two is met, then the tie-in sale has violated the Clayton Act.²⁵ The distinction between these two standards of illegality has become blurred in practice due to the judicial attenuation of standards of proof. The Supreme Court, in particular, has seemingly combined the latter two requirements—whether intentionally or not is unclear.²⁶

Separate Products. By definition, at least two products must be involved to constitute tying. A tie-in sale exists when a seller must buy one (the tied) product in order to obtain another (the tying) product. Without the second product there cannot be a tied sale. Consequently, a plaintiff must prove that two products are involved. While this would seem to be a simple proposition in most instances, it occasionally may be more complicated. For example, a radio is actually a collection of component parts that the manufacturer may refuse to sell separately. As another example, consider the fact that most shoe stores will not sell less than a pair of shoes. Are these tying arrangements? In a sense they are, but these cases can be resolved quite easily because very few people only want one shoe. There are, however, more difficult cases. For example, the Ford Motor Company redesigned its dash board in such a way that its dealers had to use radios installed by Ford. As a result, inde-

"Antitrust treats . . . [tying arrangements] as utterly pernicious, despite the increasingly obtrusive fact that it has found no adequate grounds for objecting to them at all." His dissatisfaction is consistent with that of Posner, *Exclusionary Practices and the Antitrust Laws*, 41 U. CHI. L. REV. 506, 508-10 (1974), and Jones, *The Two Faces of Fortner: Comment on a Recent Antitrust Opinion*, 78 COLUM. L. REV. 39, 40-41 (1978).

22. For the precise language of the Clayton Act, see *supra* note 14.

23. For the specific language of the Sherman Act, see *supra* note 11.

24. 345 U.S. 594, 608-609 (1953).

25. *Id.* These rules will be discussed in greater detail. See *infra* notes 39-43 and accompanying text.

26. See *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 502-04 (1969).

pendent radio producers were foreclosed from selling to Ford dealers.²⁷ Is this a tie-in imposed upon the dealers by Ford's design decision? In this case, the court said that Ford's design decision was independent of its contracts with its dealers and consequently there was no tying arrangement. The court considered and rejected the argument that there were two separate products involved.²⁸

A very important single-product defense was raised by McDonald's,²⁹ which developed a system of hamburger restaurants operated by franchisees and which collected royalties from their franchisees' sales. McDonald's selected a location for the new restaurant, bought the land, built the restaurant, and located a franchisee for the site. The franchisee had to contract with McDonald's for the use of the McDonald's trademark and also had to lease the building and land. Principe, a McDonald's franchisee, alleged an illegal tie of the lease of the building and land to the trademark. The court ruled that the trademark license and the building lease were really a single product—the franchise. Both the trademark license and the leased property were “integral components of the business method being franchised. Where the challenged aggregation is an essential ingredient of the franchised system's formula for success, there is but a single product and no tie-in exists as a matter of law.”³⁰

Formulation of Current Doctrine. Once it is established that two separate products are involved, a plaintiff must offer proof of the second and third prongs of the three-prong test for tying arrangements. Current tying doctrine has emerged from the Supreme Court's experience with the practice. An examination of this development also will reveal the Court's policy concerns regarding this business practice.

In the early tying cases, the Court had little difficulty finding market power in the tying good market. For the most part, the defendants had patents on the tying goods which provided legal monopolies.³¹ These early cases developed the leverage theory of tie-in sales wherein a seller extended his monopoly in one market

27. Automatic Radio Mfg. Co. v. Ford Motor Co., 242 F. Supp. 852, 853 (D. Mass. 1965).

28. *Id.* at 857.

29. *Principe*, 631 F.2d 303.

30. *Id.* at 309.

31. Two earlier cases which involved patented tying goods were *United Shoe Mach. Corp. v. United States*, 258 U.S. 451 (1922), in which the lease of unpatented shoe machinery was tied to patented shoe machinery, and *IBM v. United States*, 298 U.S. 131 (1936), in which unpatented punch cards were tied to the lease of patented computer equipment.

to another market by tying one product to a second product.³² For example, the International Salt Company³³ owned patents on the Lixator, a machine that dissolved rock salt into brine for various industrial purposes, and the Saltomat, a machine that injected salt tablets into canned products during the canning process. Rather than being sold, these machines were leased to their users. One of the lease terms required the lessees to purchase all unpatented salt and salt tablets used in the machines from International Salt. In essence, salt and salt tablets were tied to the patented machines. The government sought to enjoin International Salt from carrying out the leases and alleged violation of section 1 of the Sherman Act and section 3 of the Clayton Act. International Salt's practices offended the Court because the patents were being used to restrain trade in unpatented salt. In this instance, the Court inferred the existence of market power from the existence of patents on the Lixator and Saltomat.³⁴

Section 3 of the Clayton Act only forbids conditional sales when they result in a substantial lessening of competition or tend to create a monopoly.³⁵ It is from this statute that the Court developed the "not insubstantial" amount of commerce prong of the per se test. The Supreme Court addressed this issue in a somewhat casual fashion. It observed that International Salt sold about 119,000 tons of salt in 1944 for approximately \$500,000.³⁶ Without regard to the size of the total market, the Court held that "[t]he volume of business affected by these contracts cannot be said to be insignificant or insubstantial."³⁷

Thus, the *International Salt* case stands for the proposition that a tie-in sale by a monopolist violates the antitrust laws when it forecloses competitors from a not insubstantial market. The precise dimensions of substantiality were not specified very clearly at this point. Presumably, little question was ever raised about mar-

32. *Northern Pac. Ry.*, 356 U.S. at 6.

33. *International Salt Co.*, 332 U.S. 392. A very interesting analysis and critique of this decision is provided by Peterman, *The International Salt Case*, 22 J.L. & ECON. 351 (1979).

34. The appellant's patents confer a limited monopoly of the invention they reward.

From them appellant derives a right to restrain others from making, vending or using the patented machines. But the patents confer no right to restrain use of, or trade in, unpatented salt. By contracting to close this market for salt against competition, International has engaged in a restraint of trade for which its patents afford no immunity from the antitrust laws.

332 U.S. at 395-96.

35. See *supra* note 14.

36. 332 U.S. at 395.

37. *Id.* at 396.

ket power because the International Salt Company had a lawful monopoly on its machines through its patents and therefore market power was presumed.

Tying arrangements clearly involve a conditional sale and therefore are subject to section 3 of the Clayton Act.³⁸ They also allegedly restrain trade and thereby are subject to section 1 of the Sherman Act.³⁹ In 1953, the Supreme Court laid down the different standards of illegality under the Sherman and Clayton Acts in its *Times-Picayune* decision.⁴⁰ It also articulated the antitrust concerns surrounding the business practice of tying.

The *Times-Picayune* case involved a newspaper publisher that owned both the only morning newspaper and one of the two afternoon newspapers in New Orleans. Under the publisher's "unit plan", advertisers were not permitted to buy advertising space in either newspaper separately. Instead, they had to buy space in both or in neither paper.⁴¹ Because the government filed suit under the Sherman Act, the Court felt compelled to distinguish between the Sherman and Clayton Acts' standards of illegality. After summarizing the previous tying cases decided by the Court, the majority stated:

When the seller enjoys a monopolistic position in the market for the "tying" product, or if a substantial volume of commerce in the "tied" product is restrained, a tying arrangement violates the narrower standards expressed in § 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred. And because for even a lawful monopolist it is "unreasonable, *per se*, to foreclose competitors from any substantial market," a tying arrangement is banned by § 1 of the Sherman Act whenever *both* conditions are met.⁴²

Thus, the Court held that the Sherman Act condemns a tying arrangement whenever "monopoly" power is shown in the tying good and a "substantial" amount of commerce in the tied good is affected. In contrast, the Clayton Act is offended when either of these conditions is satisfied. Subsequent decisions have so attenuated the requirements for proving either condition that there is practically no distinction between the Sherman Act and the Clay-

38. See *supra* note 14.

39. See *supra* note 11.

40. 345 U.S. 594.

41. *Id.* at 596-97.

42. *Id.* at 608-09 (footnote omitted).

ton Act.⁴³

In *Times-Picayune*, the Court expressed its concerns over the economic effects of tie-in sales. Specifically, it was concerned about the buyer's freedom of choice being curtailed.⁴⁴ More importantly, however, the Court was concerned about market foreclosure. When a customer accepts a tying arrangement, competitors in the tied good market are foreclosed from selling to the purchasers of the tying good.⁴⁵ For example, the competitors of International Salt were foreclosed from selling salt or salt tablets to those customers who used the Saltomat or the Lixator.

In its *Northern Pacific*⁴⁶ decision in 1958, the Court reiterated its concern for buyer sovereignty and foreclosure of competitors.⁴⁷ As part of a program to encourage the private development of railroads, Congress gave Northern Pacific approximately 40 million acres of land in checkerboard fashion along its proposed line. This permitted intermittent private development and subsequent sale or lease by the railroad. These land grants were made in 1864 and 1870. By 1949, Northern Pacific sold approximately 37 million

43. See *infra* notes 44-71 and accompanying text.

44. "By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market." 345 U.S. at 605.

45. "[T]he effect on competing sellers attempting to rival the 'tied' product is drastic: to the extent the enforcer of the tying arrangement enjoys market control, other existing or potential sellers are foreclosed from offering up their goods to a free competitive judgment; they are effectively excluded from the marketplace." *Id.* at 605.

46. *Northern Pac. Ry.*, 356 U.S. 1. An excellent examination of this case is provided by Cummings & Ruhter, *The Northern Pacific Case*, 22 J.L. & ECON. 329 (1979).

47. For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed [tying arrangements] . . . deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons [tying agreements] . . . are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected. . . . Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most.

356 U.S. at 5-6 (footnotes & citations omitted).

acres and leased the remainder.⁴⁸ In many of its sales contracts and nearly all of its leases, Northern Pacific included a "preferential routing" clause. These preferential routing clauses compelled the buyer or the lessee "to ship over its lines all commodities produced or manufactured on the land, provided that its rates (and in some instances its service) were equal to those of competing carriers."⁴⁹ Thus, the basic question before the Court was whether the preferential routing clause in the Northern Pacific sale and lease agreements constituted an illegal tying arrangement under section 1 of the Sherman Act.

The Court disposed of this question without much trouble.⁵⁰ It held that Northern Pacific's preferential routing clause was an illegal tying arrangement because Northern Pacific had "sufficient economic power" to appreciably restrain trade in transportation services.⁵¹ This was an important step in the attenuation of the standards of illegality set out in *Times-Picayune*. The Court made it very clear that the standard was being relaxed:

While there is some language in the *Times-Picayune* opinion which speaks of 'monopoly power' or 'dominance' over the tying product as a necessary precondition for application of the rule of *per se* unreasonableness to tying arrangements, we do not construe this general language as requiring anything more than sufficient economic power to impose an appreciable restraint on free competition in the tied product (assuming all the time, of course, that a "not insubstantial" amount of interstate commerce is affected).⁵²

In other words, the Court was no longer requiring that the seller have monopoly power or dominance in the market for the tying good in order to find a violation of section 3 of the Clayton Act or section 1 of the Sherman Act. The Court relied upon the strategic location of Northern Pacific's land and the number of tying arrangements to infer sufficient economic power.⁵³

48. *Id.* at 2-3.

49. *Id.* at 3 (footnote omitted).

50. "We wholly agree that the undisputed facts established beyond any genuine question that the defendant possessed substantial economic power. . . ." *Id.* at 7.

51. *Id.*

52. *Id.* at 11.

53. This land was strategically located in checkerboard fashion amid private holdings and within economic distance of transportation facilities. . . . [C]ommon sense makes it evident that this particular land was often prized by those who purchased or leased it and was frequently essential to their business activities. In

The Supreme Court's standard for determining the existence of sufficient economic power in the tying good continued its downward slide with the *Loew's* decision⁵⁴ in 1962. The salient feature of this case was that six major distributors of pre-1948 copyrighted movies for television broadcasting engaged in block booking. In selling films to television stations, the defendants put one or more desirable feature films in a package or block with one or more unwanted or inferior films. For example, station WTOP obtained classics like "Casablanca" and "The Man Who Came to Dinner" along with the less noteworthy "Tugboat Annie Sails Again" and "Tear Gas Squad."⁵⁵

The Court decided that market dominance need not be shown at all and that economic power may be ascertained qualitatively:

Market dominance—some power to control price and to exclude competition—is by no means the only test of whether the seller has the requisite economic power. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.⁵⁶

Thus, the indicia of sufficient economic power⁵⁷ were broadened to include "uniqueness" and "desirability." In the case at hand, this was necessary because *Loew's* market share was indeterminate.⁵⁸

disposing of its holdings the defendant entered into contracts of sale or lease covering at least several million acres of land which included "preferential routing" clauses. The very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power, at least where, as here, no other explanation has been offered for the existence of these restraints. The "preferential routing" clauses conferred no benefit on the purchasers or lessees. While they got the land they wanted by yielding their freedom to deal with competing carriers, the defendant makes no claim that it came any cheaper than if the restrictive clauses had been omitted.

Id. at 7-8 (footnote omitted).

54. *United States v. Loew's Inc.*, 371 U.S. 38 (1962). A concise economic analysis of this case was presented by Stigler, *United States v. Loew's Inc.: A Note on Block-Booking*, 1963 *SUP. CT. REV.* 152.

55. 371 U.S. at 41-42.

56. *Id.* at 45 (footnote omitted).

57. By this time, the Court's position was that "[t]he requisite economic power is presumed when the tying product is patented or copyrighted." *Id.* at 45-46 (citations omitted).

58. *United States v. Loew's, Inc.*, 189 F. Supp. 373, 381-82 (S.D.N.Y. 1960), *rev'd in part*, 371 U.S. 38 (1962). The Court also raised the customary antitrust concerns regarding tying arrangements: "[T]hey may force buyers into giving up the purchase of substitutes for the tied product . . . and they may destroy the free access of competing suppliers of the tied product to the consuming market. . . ." 371 U.S. at 45 (citation omitted).

The current standards of proof for per se illegality of tying arrangements emerged from the *Fortner* litigation.⁵⁹ In 1960, Fortner Enterprises, a real estate development corporation, obtained a \$2,000,000 loan from a U.S. Steel subsidiary to buy prefabricated houses from a U.S. Steel division and to buy the land on which they were to be built, which was not owned by U.S. Steel. In addition, the loan was sufficient to cover all construction costs. Since the credit terms were highly advantageous, Fortner leaped at the unusual bargain which permitted it to erect 210 houses.⁶⁰ Apparently, Fortner was not a very good credit risk.⁶¹ It defaulted on the U.S. Steel loan complaining that the houses were too expensive and were not of high quality.⁶² Fortner filed an antitrust suit alleging that U.S. Steel illegally tied its overpriced prefabricated houses to the extraordinary loan.

In *Fortner I*,⁶³ the issue before the Court was whether Fortner was entitled to its day in court since the lower court had granted U.S. Steel a summary judgment. The majority held that a tie-in sale had occurred.⁶⁴ Since the volume of commerce affected was neither paltry nor insubstantial, one element of the test for per se illegality was satisfied.⁶⁵ The majority held that one can infer the existence of market power when "the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market."⁶⁶ This comes very close to saying that the ability of a seller to impose a tying arrangement on its customers provides proof of the market power that makes tying illegal. But if this were the case promotional sales would constitute illegal ties. As a *reductio ad absurdum*, suppose a gasoline station offered a free car wash with the

59. The *Fortner* litigants made three major appearances before the district court, three before the circuit court of appeals and two before the Supreme Court. *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610 (1977), was the final Supreme Court decision. See Handler, *supra* note 21, at 1017 n.225 for a concise summary of the history of the *Fortner* litigation.

60. 429 U.S. at 613-14.

61. *Id.* at 616.

62. *Dam, Fortner Enterprises v. United States Steel: "Neither a Borrower, Nor a Lender Be"*, 1969 Sup. Ct. Rev. 1, 7-8.

63. *Fortner*, 394 U.S. 495. An exceptionally incisive analysis of this decision is provided in *Dam, supra* note 62.

64. 394 U.S. at 498.

65. *Id.* at 501.

66. *Id.* at 504. This index of economic power arose first in *Northern Pacific* where the host of tying arrangements was compelling evidence of Northern Pacific's great power. 356 U.S. at 7-8. See *supra* note 50.

purchase of at least ten gallons of gasoline. This would be an illegal tying sale if a large number of customers took advantage of the offer. Surely, the majority did not intend such a result. In any event, the case was remanded to the district court with directions that the case be set for trial.

When *Fortner II*⁶⁷ was decided, the Supreme Court apparently recognized that some of the *Fortner I* language was unfortunate. In holding for U.S. Steel, the Court reiterated that the relevant transactions involved a not insubstantial volume of commerce.⁶⁸ It then turned to the sufficiency of U.S. Steel's market power in the credit market:

Although the Credit Corp. is owned by one of the Nation's largest manufacturing corporations, there is nothing in the record to indicate that this enabled it to borrow funds on terms more favorable than those available to competing lenders, or that it was able to operate more efficiently than other lending institutions. In short, the affiliation between the petitioners does not appear to have given the Credit Corp. any cost advantage over its competitors in the credit market. . . .

The fact that Fortner—and presumably other Home Division customers as well—paid a noncompetitive price for houses also lends insufficient support to the judgment of the lower court. Proof that Fortner paid a higher price for the tied product is consistent with the possibility that the financing was unusually inexpensive and that the price for the entire package was equal to, or below, a competitive price. . . .

The most significant finding made by the District Court related to the unique character of the credit extended to Fortner. This finding is particularly important because the unique character of the tying product has provided critical support for the finding of illegality in prior cases. . . .

.....
Quite clearly, if the evidence merely shows that credit terms are unique because the seller is willing to accept a lesser profit—or to incur greater risks—than its competitors, that kind of uniqueness will not give rise to any inference of economic power in the credit market. Yet this is, in substance, all that the record in this case indicates.

The unusual credit bargain offered to Fortner proves nothing more than a willingness to provide cheap financing in order to sell expensive houses. Without any evidence that the Credit Corp.

67. 429 U.S. 610.

68. *Id.* at 611-12.

had some cost advantage over its competitors—or could offer a form of financing that was significantly differentiated from that which other lenders could offer if they so elected—the unique character of its financing does not support the conclusion that petitioners had the kind of economic power which Fortner had the burden of proving in order to prevail in this litigation.⁶⁹

This decision seems to be a small step away from a myopic per se rule of illegality. In particular, it recognizes the existence of promotional sales, which is a step in the right direction. Now, our hypothetical gasoline station must have some unique advantage in offering car washes or other gasoline stations will be unable to show market power in the tying good. The other gasoline stations will have to compete by offering free car washes, direct price reductions, free glassware or trading stamps.⁷⁰

In spite of the *Fortner II* decision, the antitrust treatment of tying continues to be quite harsh. Although it is not really per se illegal, rather it is prima facie illegal,⁷¹ tying is a very hazardous course of business conduct. If two products are sold on a conditional basis, a plaintiff has wide latitude in proving sufficient economic power in one of them. The “not insubstantial” volume of commerce requirement is quite easily met in any modern setting.⁷² This state of affairs would not be objectionable if it were true that tying arrangements were only used to suppress competition. Unfortunately, this is not the case.

III. ECONOMIC ANALYSIS OF TYING

Tying arrangements involve two evils that the Supreme Court has tried to prevent. First and foremost, tying arrangements deny competitors free access to the market for the tied good.⁷³ Second, buyers are forced to forego their free choice between competing products in the tied market.⁷⁴ In one sense, these concerns are over the same thing: a vague judicial feeling that it is unfair to use

69. *Id.* at 617-22 (footnotes omitted).

70. See Jones, *supra* note 21, at 40-41, who makes the sensible argument that if there are competitors in the tying good market, then tying should not be illegal per se.

71. This point was aptly made by Slawson, *A Stronger, Simpler Tie-In Doctrine*, 25 ANTITRUST BULL. 671, 675, 692 (1980). A party can raise defenses to explain why a tie-in should not be found to be illegal.

72. For a persuasive critique of the present rule, see Baker, *The Supreme Court and the Per Se Tying Rule: Cutting the Gordian Knot*, 66 VA. L. REV. 1235 (1980).

73. *Times-Picayune*, 345 U.S. at 605.

74. *Id.*

power in one market to influence economic activity in a separate market. This concern has been expressed as the leverage theory of tie-ins.⁷⁵ When the seller of tying good A requires its customers to also buy tied good B, the Court assumed that some economic power was transferred from the A market to the B market. According to this view, somehow the seller expanded or levered his monopoly power from one market to another.⁷⁶ This, of course, is not possible. A seller cannot get two monopoly profits from one monopoly. The only way that the seller can impose additional requirements on its customers, without accepting a decrease in demand, is to reduce the price of the tying good. Thus, the leverage theory of tying is unsatisfactory and should not provide the foundation for a generally hostile antitrust treatment of tying arrangements. But there is a more serious criticism: a tying arrangement is often motivated by factors that are unrelated to any transfer of market power or suppression of competition. In this section, we shall examine several of these.

Technological Interdependence. There are times when the tying and tied goods are technologically interdependent. The tying good may not perform satisfactorily unless the tied good is used with it. At the same time, the seller's reputation is on the line. In order to protect his reputation, the seller endeavors to tie the two goods together. In this fashion, he attempts to guarantee that the tying good is used properly. For example, in *Jerrold Electronics*,⁷⁷ the defendant required that a buyer of its advanced cable television antenna also buy its installation and maintenance services. Jerrold claimed that this was necessary to prevent the antenna from performing poorly. Since the cable television antenna was a rather new development in the field with a number of potential problems, the defendant was protecting his own goodwill.⁷⁸ In this situation the tie-in appears to be advantageous to both the seller and the buyer. The seller protects his reputation and the buyer is guaranteed a product that will operate efficiently. If this is the case, however, why is a tying arrangement necessary? Why does the buyer have to be compelled to do what is good for him?

A buyer often makes choices based on business relationships or

75. *Northern Pac. Ry.*, 356 U.S. at 6; but see *Times-Picayune*, 345 U.S. at 614.

76. See *Loew's*, 371 U.S. at 45.

77. *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545, 552 (E.D. Pa. 1960), *aff'd*, 365 U.S. 567 (1961).

78. *Id.* at 556-57.

because the purchase is less expensive in the short run.⁷⁹ A seller may decide to compel the buyer to do what is in his own best interest simply because it is more efficient to do so. The information that is necessary for the buyer to make the correct decision may be costly to convey. Moreover, mistakes by the buyer have consequences for the seller. It is the seller's reputation that suffers when a large number of complaints surface as a result of the improper use of his product. Although it is true that certain buyers will have the proper information and purchase the tied good, the simplest and most efficient way for the seller to protect himself from those buyers who do not take the proper precaution is to tie the two goods together.⁸⁰

Evasion of Government Regulation. Whenever the government attempts to regulate market activity to achieve an unnatural result, it creates incentives for evading the regulation. Tie-in sales can be used to evade two types of market interferences: ceiling price regulation and profit regulation. In either case, the tie-in is used to increase the seller's return without creating any new market power.

First, consider price ceilings. Suppose that a price ceiling has been imposed on a good that is used in fixed proportions with another good that is not being regulated. The seller can increase the price of the tied good so that the combined profit on the two goods would be no more than what it would have been if the price of the tying good had not been restricted.⁸¹ No monopoly is being extended into the market for the tied good; the seller's share of the market for the tied good would only be whatever it would have been if the tying good had been priced freely.⁸² A simple example may be helpful. In the early days of gasoline price controls under President Nixon, some enterprising service stations owners recog-

79. *Accord id.* at 556-57.

80. The courts have given some recognition to this justification for tying. In *Jerrold*, for example, the court held that the principle was sound. *Id.* at 557. Unfortunately for *Jerrold*, it held that the practice had gone on too long and was no longer justified. *Id.* at 557-58. If there is a suitable substitute for tying, the court will reject this defense. For example, in *International Salt Co.*, 332 U.S. at 392, International Salt tied salt to leases on its salt dispensing machines. International Salt made the argument that tying was necessary to protect the machines from inferior salt. The Court correctly reasoned that International Salt could impose standards or specifications to prevent such problems. *Id.* at 397-98.

81. See *Bowman, Tying Arrangements and the Leverage Problem*, 67 *YALE L.J.* 19, 21-23 (1957).

82. *Bowman, supra* note 81, at 23. This implies that the output of the tied good sold by the monopolist may be greater than the output sold without the tie-in, but the output he can sell to maximize profits is limited.

nized that the mandated price was too low. As a result, they were forced to charge a price for gasoline that was lower than the price that buyers were willing to pay. In an effort to extract the full value of the gasoline, they began to fill tanks only on the condition that the customer buy a cheap plastic windshield scraper for five dollars. The purpose was obvious: to evade the price controls and thereby increase profits.⁸³

Second, consider profit regulation. When a firm's profits are constrained by regulation this is often accomplished indirectly by price regulations. The seller must get regulatory approval for its prices which are supposed to yield no more than the maximum permissible rate of return or profit.⁸⁴ If the regulated monopolist also sells in an unregulated market, it can transfer profit from the regulated to the unregulated sphere. Assume a regulated monopoly exists in the market for lightbulbs and that this monopolist also sells desk lamps that are sold and priced competitively. Since one uses a desk lamp in fixed proportions with a lightbulb, by tying the two products together, the monopolist can raise the price of the desk lamp to a level that will create the maximum revenue had the price of the bulbs remained unrestricted. Of course, the lightbulb monopolist has not extended his monopoly to the market for desk lamps but the monopolist has been able to evade the profit constraint through tying.⁸⁵ His total profit on the two goods equals the profit he would have earned on the bulbs had the market been unregulated.

Meter Pricing. In some cases, a seller may tie two complementary goods⁸⁶ in an effort to meter the use of one of them. A concrete example of this motive for tying is provided by the facts in the *IBM* case.⁸⁷ IBM produced and leased its card processors to business firms. The value to any firm of having a card processor sitting in the office ready for use depends upon the frequency and

83. In this case, it is not necessary that the producer of the tying good actually produce the tied good. If rivals produce the tied good more efficiently, the tying good producer will buy the tied goods from those rivals and resell them.

84. For an exceptionally good treatment of the economics of regulation confer A. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* (1970) (in two volumes).

85. The evasion of profit constraints underlies much of the concern over the relationship between AT&T and its wholly owned subsidiary, Western Electric. See 1 *id.* at 28 n.20, for a brief discussion. In addition, see Blair, *The Scope of Regulation in the Competitive Telephone Equipment Market*, PUB. UTIL. FORT. Dec. 17, 1982, at 29.

86. Complements are goods that are used together; e.g., hot dogs and mustard, bread and butter, paper towels and towel dispensers.

87. *IBM v. United States*, 298 U.S. 131 (1936).

intensity of its use, i.e., upon the number of cards processed. But IBM leased its card processor at a fixed monthly rate to all customers. This lease was conditioned upon the lessee's agreement to use IBM's cards in the card processor.⁸⁸ IBM raised the card price above the competitive level and earned supra-competitive profits on the sale of cards.⁸⁹ It should be noted that the user needs a card for each unit of service performed by the processor. Thus, the cards served a way of metering the intensity of use of the processor.

One way of viewing this pricing arrangement is as a variable rental rate contract. The user pays (1) a competitive price for the cards plus (2) a user fee equal to the difference between the nominal card price and the competitive price plus (3) the monthly rental. In effect, the rental price of the card processor is a function of the firm's use of the card processor. Clearly, the purpose of tying is not to monopolize the card market. It is to make more profit by charging different rental rates to different users.⁹⁰

The tied good acts as a counting device. The buyer who makes greater use of the tying good pays more than the buyer with a smaller demand because he buys more units of service. The seller is not in a position to remove other suppliers of the tied good from the market because the sellers of close substitutes for the tied good can still sell them in other markets in which the tied good is demanded.⁹¹ Moreover, the seller may buy the tied good from these other firms. Consequently, they will sell to the tying firm rather than directly to the tying good's user.

Those opposed to the use of a tie-in as a counting device suggest that the monopolist might initially charge different prices to different users of the tying good based on expected use by the buyer. Errors, though, are likely to be made by attempting to estimate the intensity of the buyer's use and any adjustments would be difficult

88. *Id.* at 134. IBM tried to claim that quality control of the cards was necessary to protect its goodwill. This argument did not succeed due to the possibility of issuing specifications for the cards. *Id.* at 138-40.

89. *Id.* at 136.

90. Most antitrust analysts characterize this practice as price discrimination. See, e.g., Bowman, *supra* note 81, at 23, and Posner, *Exclusionary Practices and the Antitrust Laws*, 41 U. CHI. L. REV. 506, 508 (1974). This interpretation is not apt to be correct, however, as Hansen & Roberts, *Metered Tying Arrangements, Allocative Efficiency, and Price Discrimination*, 47 S. ECON. J. 73 (1980), have shown.

91. Although it occurs rarely, there is an exception. In those situations where the tied good has no uses other than with the tying good, the competitors will be driven out of the market for the tied good.

to make. Any mistakes may create a loss in the potential return. The tie-in eliminates the need for estimation and the possibility of error.⁹²

Another suggested alternative is to attach a meter to serve as a counting device. The seller can charge the buyer a fixed rate for the good plus a rate varying with use.⁹³ This method would be just as effective but not likely to be as efficient for the seller due to increased costs to him for the meters as well as for the monitoring of the meters. Monitoring the meters would require not only a check to determine the amount of use, but also a check to determine if the meter is being tampered with or disconnected. Of course, there are additional costs when one uses a tying arrangement because the tie-in must also be monitored to prevent the buyer from substituting cheaper tied goods of lesser quality which the buyer can purchase at the competitive price. These additional costs presumably are lower than those associated with metering or a profit-maximizing firm would not select a tying arrangement.

Economies of Joint Sales. Tie-ins may be intended to take advantage of an economy of scale in either the production or distribution of goods.⁹⁴ If two goods can be produced or sold together at lower cost than they can be separately, then a tying arrangement would be an appropriate method of ensuring the maximum return from these goods. By requiring the buyer to purchase the goods together, the seller can expect greater efficiency (i.e., lower costs and higher profits) than if he were to offer the two goods separately. Assuming that the seller passes along the economies of scale to the buyer, the buyer would be better off buying both goods from the seller with or without a tie-in. The buyer, however, may not always choose the seller's tied good for non-price reasons. For example, he may choose to purchase the tied good from another supplier with whom he has developed a good business relationship. The supplier of the tying good can eliminate this possibility through the tying arrangement.

Another situation also requires implementation of a tie-in due to economies of combined sales. In the *Times-Picayune*⁹⁵ case, for ex-

92. The only additional requirement would be that the overcharge on the tied good must be specified in advance, which may be no mean feat.

93. See Ferguson, *Tying Arrangements and Reciprocity: An Economic Analysis*, 30 LAW & CONTEMP. PROBS. 552, 555-56 (1965).

94. An "economy of scale" exists when the per unit cost falls as the scale of operation expands.

95. *Times-Picayune*, 345 U.S. 594.

ample, the publisher of a morning and an evening newspaper required all advertisers to buy space in both papers. The facts in the case suggested that a major portion of the cost savings would not have been realized unless all advertisers had agreed to purchase space in both newspapers. For example, assume there was no tying arrangement and that one advertiser chose to buy space in the morning edition only. This one difference in the layout of the advertising pages would make it necessary for the newspaper to rearrange the entire layout to accommodate this one advertiser. In the process, higher costs would have been incurred. A tie-in based on economies of joint sales, then, increases the net return for the seller and presumably leads to lower prices for the buyers.⁹⁶

*Uncertainty.*⁹⁷ It is hardly profound to note that the world in which we live is an uncertain place. Nonetheless, much antitrust analysis is conducted as though risk and uncertainty do not exist. But they do exist and are avoided by risk-averse⁹⁸ decision makers. In avoiding or mitigating risk, the decision-maker must give up something - namely, profit. Tying can be used to reduce the adverse effects of some kinds of uncertainty and improve the profits of the firm offering the tie-in.

A concrete example may be helpful here. The production of a hammer requires that one handle and one head be combined in fixed proportions by a hammer producer. Suppose that the production of hammer-heads is monopolized due to a legitimate patent,⁹⁹ and that the production and sale of handles and hammers are competitively organized. The hammer-head monopolist will attempt to maximize his profits through selecting the appropriate price and output of hammer heads. This is a simple optimization problem, which has been solved in the economics literature for some time.¹⁰⁰

96. When there are economies of joint sales the judicial response has been to decide that there are not two separate products. Thus, tying is not found because there is only a single product. *Id.* at 613-14.

97. This section is based upon Blair & Kaserman, *Uncertainty and the Incentive for Vertical Integration*, 45 S. ECON. J. 266 (1978) and Blair & Kaserman, *Tying Arrangements and Uncertainty* (1982) (photocopy on file with the Florida State University Law Review).

98. A risk-averse decision maker will always reject an actuarially fair gamble. The classic discussions of risk aversion are provided by Pratt, *Risk Aversion in the Small and in the Large*, 32 *ECONOMETRICA* 122 (1964) and Arrow, *Essays in the Theory of Risk Bearing*, MARKHAM ECONOMICS SERIES 90-120 (1971).

99. This assumption of a legal hammer-head monopoly is made only so our attention is not directed to extraneous issues. If the monopoly were not legal, the appropriate public policy response is to prosecute the unlawful monopoly.

100. See, e.g., Spengler, *Vertical Integration and Antitrust Policy*, 58 J. POL. ECON. 347 (1950).

Suppose that the price of the handles is uncertain but that the hammer producers must commit themselves to specific production levels before they are able to observe the price they will have to pay for these handles. In other words, each firm must plan its future output of hammers on the basis of orders for future delivery and some probabilistic notion of what the handle prices will be. Of course, each hammer producer will be aware of the actual costs only when the handles and heads are purchased. It has been shown that the risk-averse hammer producer will attempt to mitigate the impact of uncertainty by acting cautiously in determining his production levels.¹⁰¹ Consequently, his need for hammer-heads and handles is reduced. As a direct result, the hammer-head monopolist's profit declines because he is selling fewer hammer-heads.

Consider the effect of a tie-in sale. The hammer-head monopolist could offset this impact of uncertainty by selling heads and handles in a package to the hammer producers. Specifically, the hammer-head monopolist will buy handles at the competitive, albeit random, price. The hammer producers will then buy one handle and one head at certain prices for each hammer that they intend to produce. Due to the intervention in the handle market and the removal of uncertainty, the hammer producers will expand output and their purchases of hammer-heads.

The need for tying in this case is clear. The hammer producer will be only too happy to buy his requirements for handles from the hammer-head producer whenever the actual price of handles exceeds the average price. But when the actual price is below the average, he will try to purchase handles on the open market. The hammer-head producer, however, wants to use the gains from sales of handles at prices above the average to offset the losses when prices are below the average. Thus, he will have to insist on purchase commitments for all prices of handles.¹⁰²

The social welfare effects of tying in this instance are decidedly positive. The output of hammers expands and its price falls thereby making consumers better off. Hammer producers are no worse off because uncertainty has been reduced for them. Even the handle suppliers are better off because demand for handles expands. There appear to be no losers, only gainers.

Promotional Ties. On occasion, conditional sales are made as

101. See Blair, *Random Input Prices and the Theory of the Firm*, 12 *ECON. INQUIRY* 214, 218 (1974).

102. We are unaware of anyone's raising this defense in an actual tying case. This, however, does not mean that the theory is without empirical support.

promotions. For example, a grocery store may offer a five-pound bag of sugar at an extremely low price on the condition that the buyer spend at least ten dollars in the store. Otherwise, the price of the sugar is the normal price. It is obvious in this case that the seller has no monopoly power. He uses a loss leader (the sugar) to induce customers to buy less attractively priced merchandise. Although the low-priced sugar is nominally a tying good, no one is confused into thinking that this tying arrangement has any monopolistic motive, that any market is foreclosed, or that any consumer choice is infringed.¹⁰³

Not all promotional ties are so easy to analyze, however, as the *Fortner* litigation demonstrates.¹⁰⁴ U.S. Steel, which was trying to sell prefabricated housing, offered Fortner Enterprises very attractive credit terms that covered more than the cost of the housing. The excess credit was not available unless Fortner bought the housing from U.S. Steel.¹⁰⁵ In this case, the issue of a promotional tie arose. Was Fortner forced to buy unwanted homes in order to get attractive financing? If so, we have a tie-in sale. Alternatively, was the attractive financing used as an inducement to buy the homes from U.S. Steel rather than from someone else? If so, we have a promotion rather than a tie-in sale.¹⁰⁶ A promotional sale is a means of competing whereas antitrust orthodoxy holds that tie-in sales are a means of avoiding competition. Thus, the distinction is very important to everyone concerned.¹⁰⁷

Variable Proportions. There are some tie-in sales in which the effect on society is unknown. Whenever a tying arrangement leads to a reduction in social welfare it should be held unlawful.¹⁰⁸ Such a situation can arise when a monopolist's product is used in variable proportions by its customers in producing another commodity. The essence of variable proportions is that one can produce a spe-

103. *Northern Pac. Ry.*, 356 U.S. at 6-7.

104. *Fortner*, 429 U.S. 610.

105. See *supra* notes 59-72 and accompanying text.

106. We owe this succinct distinction to Professor Milton Handler. See Handler, *supra* note 21, at 1017.

107. The Court found that U.S. Steel was offering a promotion rather than a tie-in. "The unusual credit bargain offered to Fortner proves nothing more than a willingness to provide cheap financing in order to sell expensive houses." *Fortner*, 429 U.S. at 622 (footnote omitted).

108. The proper focus of antitrust should be the promotion of competition and thereby the promotion of consumer welfare. For a historical argument that this is proper, see H. THORELLI, *THE FEDERAL ANTITRUST POLICY*, 604-09 (1955). For an economic argument that this is sound public policy, see R. BORK, *THE ANTITRUST PARADOX*, 81-89 (1978).

cific commodity with varying quantities of the inputs.¹⁰⁹ For example, a sweater can be made with varying quantities of capital equipment and labor. Firms can be relied upon to select that combination of inputs which minimizes the costs of production and thereby maximizes profit.

Suppose that inputs A and B are combined in variable proportions to produce a commodity X. Further, assume that the production of B and X is competitively organized while A is monopolized. If the A monopolist sets its profit maximizing price, the X producers will substitute away from the use of A and use a relatively greater quantity of B to produce any given quantity of X. By doing this, the X producers will minimize their costs.

Suppose, now, that the A monopolist recognizes that its customers have substituted away from the monopolized input. One response is to vertically integrate, while an alternative response is to use a tying arrangement.¹¹⁰ The A monopolist can produce the necessary units of B or simply buy them from the existing producers of B. Then he will sell inputs A and B to the producers of the final good. His price on A will be reduced and the price on B will be raised to the point where the ratio of the prices charged is equal to the ratio of competitive prices. When this has been accomplished, the producers of X will not substitute away from the monopolized input A. The X producers will use the socially efficient combination of inputs for the quantity of X produced. The input A monopolist will extract all of the monopoly profit inherent in the demand for X by raising both input prices above their costs in the same proportion.

As a general proposition, the social welfare effects are indeterminate.¹¹¹ This results from the fact that we are trading off higher X prices and smaller X output for more efficient production. There are, however, instances where the X output increases.¹¹²

In contrasting the use of tie-in as a counting device with the variable proportion situation, the difference lies in the necessity of control over the tied good. The tie-in is not essential to the maximization of profits in the counting case, i.e., a meter can be used.

109. Our hammer example, *supra*, notes 99-102 and accompanying text, involved fixed rather than variable proportions.

110. See Blair & Kaserman, *Vertical Integration, Tying, and Antitrust Policy*, 68 AM. ECON. REV. 397 (1978), for a brief, albeit technical, discussion of this point.

111. *Id.* and the references cited therein.

112. See Mallela & Nahata, *Theory of Vertical Control with Variable Proportions*, 88 J. POL. ECON. 1009 (1980), for a highly technical development.

The tie-in simply guarantees the optimal results. In the variable proportion situation, though, without control over the tied good the seller's profits will not increase. As the price of the tying good increases, the demand for that good and all its complements decreases.¹¹³ Consequently, the seller wants to keep the relative prices of the commodities equal to the relative competitive prices. This will prevent the unwanted substitution away from the monopolized commodity.

Summary. We have discussed several reasons why a producer might want to employ tying arrangements. All of these have to do with making more money, i.e., more profit. Generally, the purpose is not to monopolize or control another market. Instead, the purpose is to use whatever market power currently exists more effectively. This, of course, is sensible because there is only one monopoly profit to be extracted.

The Supreme Court, however, has continued to express concern over the foreclosure of rivals in the tied-good market.¹¹⁴ There can be little doubt that when a buyer agrees to purchase commodity B from his supplier of A the rival sellers of B are foreclosed. The real question is whether this makes any difference to consumer welfare. First, suppose that the monopolist of A is at least as efficient in producing B as the rival sellers of B. There is no reason to object to the tying arrangement because the tied good is being produced as efficiently as or more efficiently than otherwise. Second, suppose that the rival sellers of B are more efficient than the A monopolist. We should expect the A monopolist to buy B from its rivals and resell to its customers. There is no economic reason to object in this case either. The producers of B compete for sales to the A producer rather than to the A producer's customers. It should not make very much difference at which distribution level the competition is located. The competition among the producers and their access to the market still exists.

We should also recognize that the tied-good market is often very specialized. For example, in the *IBM*¹¹⁵ case the foreclosed sellers were paper companies that could not sell punch cards to IBM customers. But these firms could make a large number of other paper products. It would appear that in most of the other tying cases, no significant foreclosure had occurred in the tied-good market.

113. See Bowman, *supra* note 81, at 27.

114. *Northern Pac. Ry.*, 356 U.S. at 6; *Times-Picayune*, 345 U.S. at 605.

115. 298 U.S. 131.

The Supreme Court has also expressed concern for consumer sovereignty.¹¹⁶ Those customers who are subject to the tying arrangement supposedly are denied freedom of choice. This is true in the sense that a consumer's range of choice is restricted by the tying arrangement. The seller simply refuses to sell the tying good alone. Thus, the buyer faces several options. First, he can buy the proffered package and consume the tied and tying goods. Second, he can buy the package and resell the tied good or throw it away if it is really of no value. Third, he can do without the tying good and refuse to buy the package. In this case, he may substitute the product of a competitor of the tying good seller if such competitors exist. If no competitors exist, he must simply do without if he elects to refuse the tied package. Some careful thought reveals that the use of a tying arrangement is equivalent to a price increase in many cases. Of course, a price increase reduces the welfare of consumers, but that should be the focus of attention. The current focus on consumer choice is misdirected and misleading.

As the discussion above indicates, there are many reasons for tying arrangements. An unintended by-product may be a reduction in consumer choice, but it should be recognized that all products offered represent a compromise of sorts. Those characteristics that appeal to the largest number of consumers are combined and offered in the market. Many consumers are mildly dissatisfied with some dimension of the products currently available, but the existing combination is offered because it is most profitable for the seller. Much the same is true of tying arrangements. Infringement on consumer sovereignty is not the central concern of antitrust policy. A more profitable focus of attention would be on the anti-competitive and the pro-competitive effects of tying.

IV. A POLICY DILEMMA

Our analysis in the preceding two sections suggests that a rather serious public policy dilemma exists. The legal and economic interpretations of tying arrangements are not congruent. The antitrust statutes and the judicial opinions are hostile toward this business practice.¹¹⁷ In contrast, our economic analysis found little to condemn in tie-in sales.¹¹⁸ As a matter of fact, tying can lead to expanded output and lower prices under certain circumstances. In

116. *Northern Pac. Ry.*, 356 U.S. at 6; *Times-Picayune*, 345 U.S. at 605.

117. See *supra* notes 11-72 and accompanying text.

118. See generally *supra* notes 73-113 and accompanying text.

these instances, consumer welfare is actually improved by the tying arrangement - a result that should be applauded rather than inhibited.

The solution to this dilemma is deceptively simple. At the next opportunity, the Supreme Court should reconsider its attitude toward tying arrangements. A careful analysis will reveal that this business practice is of little antitrust concern. When tying is used to protect goodwill due to technological interdependence,¹¹⁹ to mitigate the influence of risk and uncertainty,¹²⁰ to exploit the economies of joint sales,¹²¹ or as a means of promotional selling,¹²² the welfare effects of tying are clearly positive. When tying is used to evade government price or profit regulation,¹²³ one may have some objections to tying, but they are not antitrust objections. Using tie-in sales as a metering device¹²⁴ is not objectionable. The seller exploits his market power more effectively, but not necessarily to the detriment of his customers. Finally, we come to the variable proportions motive¹²⁵ for tie-in sales. The welfare effects in this case are admittedly ambiguous. Accordingly, one must be a little tentative in condoning tying arrangements in these circumstances.

Given the predominance of positive or innocuous motives for tying, the Court should start its analysis from the premise that tying is presumptively legal. The per se illegality test should be abolished. A plaintiff then would have to shoulder the additional burden of demonstrating that a particular tying arrangement was anticompetitive. This burden would not be met by simply showing that a large volume of commerce was involved. By itself, this statistic has no informational content. For a business practice to offend the antitrust laws, it should have the effect of reducing consumer welfare. Thus, a successful plaintiff should have to prove that output is lower or prices are higher as a result of the tying arrangement. As the law now stands, plaintiffs can meet their burden of proof without establishing any adverse effect on consumer welfare.

V. INDIVIDUAL COERCION IN THE LOWER COURTS

Some lower courts have acknowledged the social utility of tying

119. See *supra* notes 77-80 and accompanying text.

120. See *supra* notes 97-102 and accompanying text.

121. See *supra* notes 94-96 and accompanying text.

122. See *supra* notes 103-07 and accompanying text.

123. See *supra* notes 81-85 and accompanying text.

124. See *supra* notes 86-94 and accompanying text.

125. See *supra* notes 108-13 and accompanying text.

arrangements, but have been bound by precedent to apply the Supreme Court's qualified per se rule.¹²⁶ These courts surely recognize that once a plaintiff obtains standing he will prevail even if consumer welfare is enhanced by the tying arrangement. This unfortunate state of affairs results from the fact that the per se rules on tying do not require a showing of injury to consumers. This is especially troublesome in a franchising context where the franchisee may benefit from the tying arrangement and even welcome it. In a class action context where the damage exposure can be enormous, the franchisor's vulnerability is particularly distressing. A relatively new inquiry has emerged that offers some protection to franchisors: the individual coercion doctrine.

The idea that coercion is an element of a successfully imposed tying arrangement has been acknowledged by the courts for some time.¹²⁷ In fact, some of the Supreme Court's language suggests a need to show compulsion.¹²⁸ Nonetheless, the Supreme Court has never considered coercion to be a controlling factor in any of its decisions. In 1971, the Second Circuit became the first court to explicitly focus on coercion as a requisite element in a tying case. In its *American Manufacturers*¹²⁹ decision, that court held that "there can be no illegal tie unless unlawful coercion by the seller influences the buyer's choice."¹³⁰ This decision was based upon the Supreme Court's decision in *Loew's*,¹³¹ which employed terminology such as "successful pressure"¹³² and "forced . . . to take unwanted films."¹³³ Although the Supreme Court's reasoning behind its decision did not reflect these coercion-related issues, the Second

126. For example, in *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1213 (9th Cir. 1977), the Ninth Circuit reviewed the economic rationales for tying and concluded that "[t]he clear implication from a purely economic standpoint is that tie-ins should be considered on a case-by-case basis because they are not inherently detrimental. They can in fact be beneficial." Nonetheless, the Supreme Court's approach was endorsed with a disappointing admission of judicial incompetence: "The difficulty with adopting such an approach . . . stems from the unwillingness, if not the inability, of courts to undertake complex economic decision making in the face of economic indeterminacy and over-crowded court calendars." *Id.*

127. *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 446 F.2d 1131 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972).

128. *Fortner*, 394 U.S. at 503-04; *Loew's*, 371 U.S. at 49; *Northern Pac. Ry.*, 356 U.S. at 6; and *Times-Picayune*, 345 U.S. at 605. *Handler*, *supra* note 121, at 1017, distinguishes sales promotions from tying arrangements on the basis of compulsion.

129. *American Mfrs. Mut. Ins. Co.*, 446 F.2d 1131.

130. *Id.* at 1137.

131. *Loew's*, 371 U.S. 38.

132. *Id.* at 40.

133. *Id.* at 49.

Circuit interpreted its language as being relevant to the facts in the case at hand. In so doing, it established a coercion doctrine.¹³⁴

Since *American Manufacturers* involved only a single buyer, proof of coercion by other buyers was not a factor. This did not become an issue until a year later when it was raised in the context of a class action.¹³⁵ In order for class certification to be granted to a plaintiff in tying arrangement cases, the plaintiff must meet the specific requirements of Rule 23 of the Federal Rules of Civil Procedure. One requirement of this rule calls for questions of mutual interest to the putative class members to predominate over individual questions.¹³⁶ As the following review of cases will indicate, several lower courts have virtually eliminated the possibility of establishing class certification by creating the individual coercion doctrine.

In *Abercrombie v. Lum's Inc.*,¹³⁷ a franchisee of Lum's failed to obtain class certification for 400 Lum's franchisees in a case involving a tying agreement that was not an explicit component of the franchise agreement. The court found itself in the awkward position of being unable to determine whether the tie-in claimed by the plaintiff affected all of Lum's franchisees in the same manner since it was not expressly written into the contract.¹³⁸ Upon citing *American Manufacturers*,¹³⁹ the court declared that "[s]uch proof will necessarily vary from franchisee to franchisee. If the Abercrombies were to establish that they made forced purchases it would not necessarily follow that other franchisees were similarly coerced. . . . Determination of the issue requires separate, distinct and individual, not common, proof."¹⁴⁰ Since the pronouncement of this doctrine, many courts have accepted it without question when confronted with class actions in a tying arrangement context, provided that there is no "substantial conformity"¹⁴¹ in the tying

134. *American Manufacturers* is considered to be the authoritative case for the coercion doctrine. Note, *Tying Arrangements and the Individual Coercion Doctrine*, 30 VAND. L. REV. 755, 761-62 (1977). The validity of this decision was confirmed three years later in *Capital Temporaries, Inc. v. Olsten Corp.*, 506 F.2d 658, 661-62 (2d Cir. 1974), which summarized, without explaining the connection, the holdings in many of the precedential Supreme Court cases dealing with tying arrangements after citing *American Manufacturers*.

135. *Abercrombie v. Lum's Inc.*, 345 F. Supp. 387 (S.D. Fla. 1972).

136. FED. R. CIV. P. 23(b)(3).

137. 345 F. Supp. 387.

138. *Id.* at 390.

139. 446 F.2d 1131.

140. 345 F. Supp. at 391-92 (footnote omitted).

141. See Note, *supra* note 135, at 771-73, for a summary of post-*Abercrombie* cases which finds that "substantial conformity" refers to the existence of no more than five differ-

contracts of the franchisees. It is a powerful basis for denying class certification in franchise tying cases, but it has not been adopted by all courts.

In the *Dunkin' Donuts*¹⁴² litigation, for example, a district court was not so amenable to denying class certification on individual coercion grounds. Fourteen franchisees sought class certification on behalf of over 600 franchisees. They alleged that Dunkin' Donuts had tied its trademark and accumulated goodwill to other less desirable products such as equipment supplies, signs, real estate, and advertising.¹⁴³ The district court explicitly rejected¹⁴⁴ the individual coercion doctrine and certified the class because it found common questions to predominate over individual questions.

On appeal, however, the Third Circuit reversed the holding of the district court and, thereby, reestablished the individual coercion doctrine: "Where, as here, plaintiff franchisees place no reliance on express contractual tie-ins, each, individually, must prove that his purchases were coerced."¹⁴⁵ The court focused on the Supreme Court's concern with the leverage theory of tying: "We believe that coercion is implicit—both logically and linguistically—in the concept of leverage upon which the illegality of tying is premised: the seller with market power in one market uses that power as a 'lever' to force acceptance of his product in another mar-

ent types of tying contracts. See also *Halverson v. Convenient Food Mart, Inc.*, 69 F.R.D. 331 (N.D. Ill. 1974). Individual proof is necessary if nineteen contracts exist, *Thompson v. T.F.I. Cos.*, 64 F.R.D. 140, 144 (N.D. Ill. 1974). Those franchisees who are subject to the same contract provisions could presumably file their own class action, i.e., the plaintiff in *Thompson* could form a class comprised of those franchisees who signed the same contract as he. This issue has not been addressed by the courts, Note, *supra* note 134, at 773, states that "coercion generally will be inferred from the contracts themselves" in the latter situation.

142. *Ungar v. Dunkin' Donuts of America, Inc.*, 68 F.R.D. 65 (E.D. Pa. 1975), *rev'd*, 531 F.2d 1211 (3d Cir. 1976), *cert. denied*, 429 U.S. 823 (1976).

143. *Id.* at 80-82.

144. *Id.* at 111-13. The court documented its assertion, *id.* at 99-106, that "the Supreme Court had not set forth a coercion requirement in the tying cases." *Id.* at 98. It conceded that coercion may play a role, but it is only "one mode of proving use of economic power." *Id.* at 114. Other modes include "evidence of a firm and resolutely enforced company policy to influence the franchisees to purchase from the franchisor or its designated sources . . . [and] . . . the acceptance by a large number of buyers of a burdensome or uneconomic tie." *Id.* at 115. The use of economic power is the inquiry which the court considered to be significant. Accordingly, the court held that the individual coercion doctrine as the sole standard of proof would lead to "metaphysical analysis," *id.* at 112, and would not account for those illegal ties in which the defendant was able to prove that the plaintiff purchased voluntarily. *Id.* at 98.

145. *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211, 1226 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976).

ket. . . ."¹⁴⁶ In addition to recognizing coercion as an integral aspect of a tying violation, the circuit court addressed individual coercion in particular: "What is sufficient to coerce one buyer's choice may not be sufficient to coerce another buyer's choice. . . ."¹⁴⁷

Subsequently, in 1977 the Third Circuit was confronted by an express tying clause in *Bogosian v. Gulf Oil Corp.*¹⁴⁸ Consistent with its earlier decision in *Dunkin' Donuts*, it ruled that if the alleged tie-in is expressly stated in the agreement between the buyer and the seller, then class certification would be appropriate because "the factual and legal questions presented in this phase will be precisely the same in a class action as they would be in an individual suit."¹⁴⁹ Consequently, the Third Circuit found coercion and the express agreement to be two alternative conditions for establishing the existence of a tie-in.¹⁵⁰ If the contract calls for a tie-in, then there is no need for an inquiry into coercion and class certification will not be denied on those grounds.

Some other courts have followed the Third Circuit's approach on implicit coercion.¹⁵¹ When the tying arrangement has not been stated explicitly, proof of individual coercion is necessary. This, of course, precludes class certification. Other courts have contradicted the view of the Third Circuit. For example, the Ninth Circuit does not require proof of actual coercion even when the tying requirement is not explicitly stated. Its reasoning depends upon the somewhat circular reasoning in *Fortner I*:

Although some cases in other circuits have required a showing of actual coercion . . . our reading of the Supreme Court's opinions supports the view that coercion may be implied from a showing that an appreciable number of buyers have accepted burden-

146. *Id.* at 1218.

147. *Id.* at 1219.

148. 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).

149. *Id.* at 453. In *Dunkin' Donuts*, 531 F.2d at 1226 n.17, the court stated: "We do not decide the question whether the individual coercion doctrine would bar a class certification where a potential class of plaintiffs relies on express contractual provisions."

150. In *Anderson Foreign Motors, Inc. v. New England Toyota Distributor, Inc.*, 475 F. Supp. 973, 988 (D. Mass. 1979), the *Bogosian* rationale of setting aside coercion when "the tie is manifest in the express terms of a standard form contract" was adopted by this district court.

151. *Hehir v. Shell Oil Co.*, 72 F.R.D. 18 (D. Mass. 1976); *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1327-28 (5th Cir. 1976); and *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701 (7th Cir. 1977) *cert. denied*, 439 U.S. 822 (1978). These courts definitely follow the Third Circuit in its treatment of this issue.

some terms, such as a tie-in, and there exists sufficient economic power in the tying product market. . . .

Coercion occurs when the buyer must accept the tied item and forego possibly desirable substitutes.¹⁵²

This rationale does not account for efficiency considerations and may, in fact, promote economic inefficiency by inhibiting an efficient organization of economic activity.¹⁵³

VI. LEGAL CONFUSION SURROUNDING INDIVIDUAL COERCION

The courts that require proof of individual coercion base this demand on Supreme Court opinions. Unfortunately, the courts that do not require such proof also cite to Supreme Court opinions as justification. Obviously, the legal effect of coercion is unclear. In the Second Circuit's decisions¹⁵⁴ which introduced coercion as an element of an illegal tie-in, the courts cited several Supreme Court decisions for support. Unfortunately, the Second Circuit neglected to explain the transition from those Supreme Court cases, which did not set forth an explicit coercion requirement, to its enunciation of a coercion doctrine.¹⁵⁵ The Third Circuit was more helpful. After reviewing the major Supreme Court decisions on tying, it found that coercion was an essential ingredient of an illegal tying arrangement. The court stated that this finding emanated from the Supreme Court's concern with the leverage theory of tying.¹⁵⁶

In contrast, the Ninth Circuit states that proof of actual coercion is unnecessary by pointing to the Supreme Court's language suggesting that coercion can be inferred from the number of buyers that have participated in the tying arrangement.¹⁵⁷ This inference is unsupportable from an economic perspective. The Ninth Circuit

152. *Moore v. Jas. H. Matthews & Co.*, 550 F.2d at 1216-17 (citations omitted).

153. In *Principe*, 631 F.2d at 309 (citing *Phillips v. Crown Central Petroleum Corp.*, 602 F.2d 616, 627 (4th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980)) the court acknowledged the special nature of the franchise relationship and the efficiency considerations: "the very essence of a franchise is the purchase of several related products in a single competitively attractive package." The court concluded that "[w]here the challenged aggregation is an essential ingredient of the franchised system's formula for success, there is but a single product and no tie in exists as a matter of law." *Id.* at 309.

154. See *American Mfrs. Mut. Ins. Co.*, 446 F.2d at 1137 (citing *Loew's*, 371 U.S. 38, and *Fortner*, 394 U.S. 495), and *Capital Temporaries, Inc. v. Olsten Corp.*, 506 F.2d at 661-63 (citing *International Salt*, 332 U.S. 392, *Loew's*, 371 U.S. 38, and *Fortner*, 394 U.S. 495).

155. See *supra* notes 129-34 and accompanying text.

156. *Dunkin' Donuts*, 531 F.2d at 1218. See *supra* note 146 and accompanying text.

157. *Moore v. Jas. H. Matthews & Co.*, 550 F.2d at 1216. See *supra* note 146 and accompanying text.

relied largely upon some unfortunate language in the *Fortner I* decision of 1969.¹⁵⁸ The Court's reasoning depends upon the characterization of tying as a "burdensome term."¹⁵⁹ Our earlier analysis of tying, however, indicates that it is not always burdensome to the customer. Certainly in the case of promotional ties the buyer will not feel burdened. Consequently, the logic behind inferring coercion from sheer numbers is tenuous at best and may be simply erroneous.

The Supreme Court has never instituted a coercion requirement for finding an illegal tie-in, either explicitly or implicitly.¹⁶⁰

The Supreme Court has spoken of "coercion," "force," and "pressure" in its tying decisions, but it has identified these as undesirable consequences of unlawful tying arrangements. The Third Circuit, however, believes that leverage implies coercive use of economic power. In contrast, the Supreme Court has defined leverage as the use of economic power without regard to coercion. The Court's most recent decision on tying, *Fortner II*¹⁶¹ in 1977, made no mention of coercion although the opinion was written five or six years after the lower courts began to examine coercion.¹⁶² As a result, the confusion surrounding the issue of coercion continues unabated.

One possible explanation for the confusion lies in the various meanings given to the term. One district court illustrated that coercion has been used differently in different instances.¹⁶³ Coercion has been defined as the use of economic power.¹⁶⁴ In another case it was defined as the acceptance of a burdensome tie-in by an appreciable number of buyers in the market.¹⁶⁵ In still another case, coercion depended upon a determination of the purchaser's willingness to buy the tied good.¹⁶⁶ One commentator has identified a number of hypothetical factors which should be taken into account in determining if coercion exists,¹⁶⁷ while another has drawn from a

158. *Fortner*, 394 U.S. at 504. See *supra* note 152 and accompanying text.

159. *Id.*

160. See *supra* notes 11-72 and accompanying text for a review of the requirements established by the Supreme Court. Austin, *supra* note 10, at 1179 argues that the existence of a tying arrangement can be determined without regard to coercion.

161. 429 U.S. 610.

162. Of course, since an explicit agreement was involved setting forth the tie, the Supreme Court did not have to reach the coercion issue.

163. *Dunkin' Donuts*, 68 F.R.D. at 112.

164. *American Mfrs. Mut. Ins. Co.*, 446 F.2d at 1137.

165. *Moore v. Jas. H. Matthews & Co.*, 550 F.2d at 1216-17.

166. *Capital Temporaries, Inc.*, 506 F.2d at 665-66.

167. See Varner, *Voluntary Ties and the Sherman Act*, 50 S. CALIF. L. REV. 271, 296-98

number of cases to demonstrate the variety of factors which the courts actually have considered.¹⁶⁸ With all of this variation in usage, it is small wonder that confusion surrounds the proper role of coercion in tying cases.

VII. COERCION AS A FACTOR IN DETERMINING THE EXISTENCE OF TYING AND LIABILITY

Because tying is a qualified per se violation of the antitrust laws there is a distinction between proving the existence of the tie-in and establishing the illegality of the tie-in. A plaintiff first must show that a conditional sale of the tie-in variety has occurred and thereby prove the existence of a possibly illegal business practice. Recall that section 3 of the Clayton Act forbids tie-in sales only when they have substantial anticompetitive effects.¹⁶⁹ Consequently, to establish the defendant's liability the plaintiff also must show that the tying arrangement is illegal. As one commentator has argued, however, the distinction between the existence and the illegality (or liability) of a tying arrangement is not always honored in practice.¹⁷⁰ Some lower courts seem to lose sight of the difference between existence and liability.¹⁷¹ The Third Circuit, for example, has stated that "proof of a tie-in must focus on the buyer, because a voluntary purchase of two products is simply not a tie-in."¹⁷² Once coercion is analyzed separately with respect to existence and liability, it is clear that coercion has minimal relevance in establishing the existence of a tie-in and from an economic perspective is irrelevant to the determination of liability for that tie-in.

The Existence of a Tying Arrangement. If we divide all tying arrangements into two classes, (1) tying by express agreement and (2) implied-in-fact tying,¹⁷³ we shall be able to organize the discus-

(1977).

168. See Note, *supra* note 134, at 768-69.

169. Section 3 forbids conditional sales when their effect is "to substantially lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 14 (1976).

170. See Austin, *supra* note 10, at 1152.

171. Some may argue that the Supreme Court's attenuation of the standards of proof of liability have made the distinction between existence and liability one without a difference. See *supra* notes 31-72 and accompanying text.

172. 531 F.2d at 1224. In contrast to the Third Circuit's conclusion that coercion is only relevant to determining the existence of a tie-in, it is important to note that the tie-in may exist but it may not be illegal because the purchases are voluntary. *American Mfrs. Mut. Ins. Co.*, 446 F.2d at 1133.

173. This dichotomy is Austin's, *supra* note 10, at 1154.

sion more clearly. When tying arrangements are by express agreement between the buyer and the seller, the existence of the tie-in is established automatically. In fact, one court in the Ninth Circuit explicitly adopted this position.¹⁷⁴ If a seller expressly (i.e., in the written contract) required the buyer to purchase the tied good, then the tie-in exists. Since that decision, sellers electing to use a tying arrangement rarely do so expressly. Absent an express contractual agreement, the tie-in must be inferred from the interaction between the buyer and the seller, which brings us to the implied-in-fact tying arrangements.

Within the category of implied-in-fact tying arrangements, there are two sub-categories: practical effect tie-ins and refusal-to-deal tie-ins. When a contract between a buyer and seller nominally permits the buyer to substitute the products of other sellers but actually denies him that freedom in practice, we have a practical effect tie-in.¹⁷⁵ There are many ways that practical effect tie-ins can occur. For example, requiring that suppliers of complementary goods be approved can be abused quite easily.¹⁷⁶ The technological design of the tying good may permit only the use of the supplier's tied goods.¹⁷⁷ Practical effect tie-ins have virtually the same impact as an express tying agreement, but they are more subtle and consequently are more difficult to recognize. In initially establishing only the *existence* of a tie-in, however, coercion would not be relevant to that determination for a practical effect tie-in because the court can look to other factors to establish its existence.¹⁷⁸

Refusal-to-deal tie-ins refer to those tie-ins in which it is proven that the buyer was threatened with termination of the contract unless he also purchased the tied good. The term "threat" itself implies force or coercion. In this context, the "threat" of a refusal to deal is distinguished from a mere "suggestion" that this may occur. This may not be an operational distinction. It is, however, an instance where it may be appropriate to apply the concept of coer-

174. See *Siegel v. Chicken Delight, Inc.*, 271 F. Supp. 722, 726 (N.D. Cal. 1967), *modified on other grounds sub. nom.*, *Chicken Delight, Inc. v. Harris*, 412 F.2d 830 (9th Cir. 1969).

175. See e.g., *Loew's*, 189 F. Supp. at 380.

176. This was the issue in *Smith v. Denny's Restaurants, Inc.*, 62 F.R.D. 459, 461 & n.6 (N.D. Cal. 1974).

177. This was at issue in *Automatic Radio Mfg. Co.*, 242 F. Supp. 852. Ford designed the dashboards of certain models so that a dealer was forced to use factory installed radios. This foreclosed plaintiff from selling to the Ford dealers. It did not foreclose them from selling to the Ford Motor Company. Ford prevailed in this case because it convinced the court that its design decisions were independent of its relationship with its dealers.

178. See Austin, *supra* note 10.

cion to determine the existence of a tying arrangement.

Most franchise agreements provide for termination due to vaguely worded failures on the franchisee's part. Nearly all franchise agreements require the franchisee to make an initial lump-sum payment in exchange for the franchise license.¹⁷⁹ This gives rise to another type of refusal-to-deal tie-in that takes place after an agreement already has been reached by the two parties. The seller may simply add another condition to a contract, e.g., requiring the purchase of a tied good, although this additional term was not part of the original agreement. The buyer, having been attracted by the original terms and having paid a franchise fee, may agree to purchase the tied good rather than risk losing his franchise license. In this situation, coercion would be an acceptable means of demonstrating the existence of an implied tie-in.

Determining Liability. After ascertaining that, in fact, a tying arrangement exists, the plaintiff must prove that the particular tying arrangement is illegal. The liability issue should not be considered, however, until the existence has been proven.

The Supreme Court has provided a two-prong test for determining per se liability.¹⁸⁰ First, a plaintiff must prove that the seller has "sufficient economic power" in the tying good market to impose burdensome terms on the buyer. This factor has been established with the existence of patents,¹⁸¹ copyrights,¹⁸² and trademarks,¹⁸³ and qualitative factors such as uniqueness¹⁸⁴ and desirability.¹⁸⁵ The second prong requires showing that a not insubstantial volume of commerce is involved. The Court has never considered coercion to be a controlling factor in determining per se liability because of its two-prong test. Coercion simply is not relevant in these circumstances.

Our economic analysis of tying arrangements¹⁸⁶ does not suggest a need to consider coercion either. For the most part, we could not find an anti-competitive motive for tying. To be sure, the seller employs a tying arrangement for no other purpose than to enhance

179. Caves & Murphy, *Franchising: Firms, Markets, and Intangible Assets*, 42 S. ECON. J. 572 (1975), suggest that the lump-sum franchise fee serves as a screening device. Those who would be undesirable franchisees presumably cannot amass the franchise fee.

180. See *supra* notes 33-72 and accompanying text.

181. *International Salt*, 332 U.S. 392.

182. *Loew's*, 371 U.S. at 45 n.4.

183. *Principe*, 631 F.2d 303.

184. *Loew's*, 371 U.S. 38.

185. *Fortner*, 394 U.S. 495.

186. See *supra* notes 73-113 and accompanying text.

his profit. But this is not necessarily bad. In any event, a buyer cannot really be coerced into doing something that is not in his self-interest. If the seller has no market power over the tying good, the buyer simply can go elsewhere. But even when the seller has monopoly power over the tying good, the buyer cannot be coerced. In his efforts to maximize his well-being, the buyer will purchase all commodities whose prices are less than or equal to their value to the buyer. This pertains to commodity bundles as well. The buyer will not pay more for the combination of products than the value of that combination.

In summary, we find a very limited role for coercion. In proving refusal-to-deal tie-ins, the concept of coercion has some relevance. In all other instances, however, the concept of coercion appears to serve no useful purpose. Even in the most extreme case where the seller has monopoly power in the tying good and that good is vital to the buyer, coercion has no relevance. The buyer acquiesces to the tying arrangement due to the seller's monopoly power in the tying good, not because of his coercive sales tactics.

VIII. CONCLUSION ON COERCION

A review of the Supreme Court's analysis and our economic analysis of tying arrangements failed to disclose any purpose served by the concept of coercion. Several lower courts, however, have embraced the individual coercion doctrine. They may have done so to avoid the Supreme Court's harsh and virtual *per se* treatment of tying. The Supreme Court's analysis constrains the courts from invoking their discretion so as to permit tying arrangements which have no adverse effect on consumer welfare or which are voluntarily entered into by the plaintiff. This constraint may be the reason for the development of the individual coercion doctrine. Although from an economic perspective a full fledged inquiry into the consumer welfare effects of a tying arrangement is the preferable approach, utilization of the coercion doctrine is preferable to the Supreme Court's harsh *per se* approach.

The individual coercion doctrine arises primarily in franchising cases. It seems inherent in an attempt to establish a franchisor-franchisee relationship that the franchisor will try to persuade the potential franchisee of many things. It becomes the franchisee's obligation to object if the franchisor tries to place conditions in the agreement that will be disadvantageous to the franchisee. The courts recognize that it is possible for persuasion to become coercion. This has been considered explicitly. If the defendant can es-

tablish that the buyer made no attempt to resist the tie-in, then the tie-in is deemed voluntary. For example, in *American Manufacturers*¹⁸⁷ the court accepted the defendant's argument that the plaintiff had not pursued a counteroffer that had been made in the initial meetings between the two parties. Thus, this court attempted to draw a distinction between a mere bargaining ploy and a coerced tie-in, regardless of the plaintiff's subsequent claim of coercion.

The individual coercion doctrine allows the court to draw the admittedly fine line between aggressive, persuasive (i.e., legal) salesmanship and coercive (i.e., illegal) salesmanship. While some courts have eschewed such distinctions on the ground that they require "metaphysical analysis,"¹⁸⁸ other courts have not been so bashful. As one court has pointed out, judges are rarely faced with cut and dried issues. Instead, they must often struggle with a party's "state of mind."¹⁸⁹ The proper distinction is admittedly vague to supporters of the individual coercion doctrine, but it may be necessary if the courts are to protect our franchise system.

Franchising has become an increasingly popular form of business organization over the past two decades. If no attempt is made to distinguish persuasion and coercion, the franchising movement could be seriously hampered. The district court in *Dunkin' Donuts* concluded that "where there is unequal bargaining power, it is not necessary to prove coercion; mere persuasion or influence will suffice."¹⁹⁰ The consequences of such an attitude may be decidedly undesirable. It places a heavy burden on the franchisor which could deter franchising. Alternatively, the franchisor could elect to offer only the franchise license to the buyer and nothing else. Such a solution would be detrimental to both parties.

Franchising would be further deterred by the certification of class actions in franchise tying cases. Some courts may want to minimize the awarding of treble damages, guaranteed to winning plaintiffs in antitrust cases, and not grant the reward to those buyers who have willingly agreed to the tie-in. If the class is successful in its case, then some recipients of the treble damages will have been undeserving.¹⁹¹ The individual coercion doctrine permits

187. 446 F.2d at 1133.

188. *Dunkin' Donuts*, 68 F.R.D. at 112.

189. *Dunkin' Donuts*, 531 F.2d at 1226.

190. 68 F.R.D. at 114.

191. *Id.* This logic places great weight on the compensatory function of antitrust damages and ignores to some extent the deterrent function. See generally, Blair, *Antitrust Pen-*

those courts to avoid applying the Supreme Court's harsh per se rule to franchise tying cases.

In the typical franchising case, it should be assumed that a potential franchisee would tend to agree with the franchisor's proposed tying arrangement at the initial contract stage because it seems advantageous to him.¹⁹² After being in business for some time, however, the franchisee may realize that he is being charged more than the competitive price for the tied good. He then resents his commitment to the franchisor and the constraints it places upon him in arranging a better deal elsewhere. By successfully proving an antitrust violation against the franchisor on grounds of an illegal tie-in, the franchisee may end up with the original benefit of a franchise purchased at an attractive price as well as treble damages resulting from the illegal tie-in. The courts favoring the individual coercion doctrine, therefore, are protecting the franchisor and the franchising system he promotes.¹⁹³ These courts should be applauded for their efforts.

alties: Deterrence and Compensation, 1980 UTAH L. REV. 57.

192. It would be advantageous in the sense that he is offered a franchise at below the monopoly price and simply has to agree to purchase tied goods.

193. The Fourth Circuit's recent holding in *Principe*, 631 F.2d 303, however, may be signalling a new doctrine which does not automatically assume that two goods are involved when a franchisor sells something else in addition to a franchise license.